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RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL JR.
CLERK

No. 86-7164

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM S. MCDOWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court conducted a sufficient inquiry into the validity of petitioner's waiver of his right to counsel before allowing petitioner to represent himself at trial.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-16a) is reported at 814 F.2d 245.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1987, and a petition for rehearing was denied on April 27, 1987. The petition for a writ of certiorari was filed on June 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to counterfeit, in violation of 18 U.S.C. 371, and bond jumping, in violation of 18 U.S.C. 3146(a) and 3150. He was sentenced to two consecutive five-year terms of imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-14a).

1. The pertinent facts are summarized in the opinion of the court of appeals (Pet. App. 2a-4a). On June 24, 1983, federal agents arrested petitioner and his wife, Revera Hendrix, in a counterfeiting "sting." That same day, petitioner's retained counsel, Don Poniatowski, visited petitioner at the police station. On June 26, 1983, petitioner and Hendrix were arraigned. Poniatowski's law partner, John Nowak, entered an appearance on petitioner's behalf at the arraignment. Petitioner and Hendrix were released on bond and promptly fled the country. On April 25, 1985, Canadian authorities arrested them in Alberta. They were returned to Michigan, where they were indicted on the instant charges. Id. at 2a.

Petitioner was represented by another retained attorney, Michael Osser, at his subsequent arraignment and detention hearing. At that hearing, petitioner, against the magistrate's advice, made his own motion to dismiss the indictment. On June 20, 1985, Nowak appeared on petitioner's behalf, but he withdrew on July 1, 1985, and Emory Clark then appeared as retained counsel for petitioner. However, at a pretrial motions hearing on August 20, 1985, the court permitted Clark to withdraw as counsel because petitioner was no longer able to pay for his services, and it appointed new counsel, Mr. Bremer, to represent petitioner. Despite Bremer's appointment, petitioner made repeated attempts to act as his own attorney at the motions hearing. Pet. App. 2a-3a. 1/

On August 26, 1985, Bremer informed the court that he could not be prepared for a trial on September 3. Petitioner refused to agree to a postponement and indicated that he was prepared to represent himself at a trial commencing on September 3. Rather than allow petitioner to proceed pro se, however, the district

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1/ It also was revealed at the hearing that petitioner had retained at least four other attorneys in the United States and Canada in an effort to recover money and property seized by Canadian authorities. Pet. App. 3a.

court permitted Bremer to withdraw and appointed yet another attorney, Charles Grossman, to represent petitioner. Grossman convinced petitioner that a postponement of the trial was in his best interest, and the trial was postponed until a future date, not earlier than November 1, 1985. Pet. App. 3a.

The final pretrial hearing was held on October 23, 1985. Petitioner was still represented by Grossman at that time, and petitioner indicated that he was satisfied with Grossman's services. However, Grossman told the court that petitioner had finally arrived at a decision as to whether he wanted to be represented by appointed counsel or to proceed pro se. Grossman informed the court that he had talked with petitioner about the representation issue and that petitioner would want to represent himself only if Grossman continued as advisory counsel. Grossman further stated that he would not make the requisite motion unless petitioner were willing to state on the record that he wanted to proceed on his own. Pet. App. 20a. The following colloquy then took place (id. at 20a-22a):

> THE COURT: Well, let me say this so that there would be no mistake about it. I would, unless given some reason otherwise, would continue to have you appointed as stand-by or consulting counsel. And I would require any motion or conduct of Mr. McDowell to be discussed with you prior to him doing so. In any event, I will tell you, Mr. McDowell, that you have not a statutory right, but as I understand it, a constitutional right to represent yourself. You also have the constitutional right to be represented by a lawyer, and you also have the right to have counsel appointed for you as we have in the event you are indigent. Do you understand those rights?
>
> DEFENDANT McDOWELL: Yeah.
>
> THE COURT: Okay. Have you made a decision as to what you wish to do in this case?
>
> DEFENDANT McDOWELL: Represent myself with his [Grossman's] assistance, if you can do that?
>
> THE COURT: All right, you understand that you will not be able to present something to me without going through him first? That's what I said to you a few minutes ago, that if he's there as your counsel to consult, then you

> must consult with him before you present something to me. That's so that he can advise you as to its legality, it's the appropriate form and that it's the appropriate time and the appropriate method of presenting it to me. And also he can at that time advise you as its likelihood of success or failure. Do you understand that, Mr. McDowell?
>
> DEFENDANT McDOWELL: Uh-huh, yes.
>
> THE COURT: Any reason why I should not grant Mr. McDowell's request in this case in this fashion, Mr. Haviland [Asst. U.S. Att'y]?
>
> MR. HAVILAND: No, your Honor.
>
> THE COURT: All right, then you may represent yourself subject to Mr. Grossman remaining your advisory counsel and subject to the restriction that I have indicated, that you must consult with him before submitting anything to me.

In preparation for trial, petitioner demanded, received and read the transcripts of the grand jury testimony of witnesses against him, and he used this information in his cross-examination of the government witnesses. Petitioner also called witnesses in his defense and testified on his own behalf, with Grossman conducting the examination. Pet. App. 4a. 2/

2.a. On appeal, petitioner argued that his conviction should be reversed because the district court failed to give him explicit warnings and to make a determination on the record with regard to petitioner's waiver of his right to counsel. In rejecting this argument, the court observed that petitioner "was clearly and repeatedly advised of his right to counsel, and his right to have counsel appointed if necessary, prior to his assertion of his right to self-representation" (id. at 6a); and the court found, on the basis of the record as a whole, that petitioner "understood the dangers and disadvantages of self-representation at the time he made his choice" (id. at 8a).

2/ During the trial, the district court repeatedly had to remind petitioner of the condition that he check with Grossman before proceeding. The court also indicated to petitioner, and to others in petitioner's presence, that he thought petitioner was making a mistake and was "in over his head." Pet. App. 4a.

Nevertheless, in order to avoid future appeals of a similar nature, the court, in the exercise of its supervisory authority, stated that henceforth "whenever a federal district judge in [the Sixth Circuit] is faced with an accused who wishes to represent himself in a criminal proceeding, the model inquiry [set forth in the Bench Book for United States District Judges, 1.02-2 (3d ed. 1986)] or one covering the same points along with an express finding that the accused has made a knowing and voluntary waiver of counsel, shall be made on the record prior to allowing the accused to represent himself" (Pet. App. 8a-9a). 3/

The court of appeals also rejected petitioner's contention that the district court erred in failing to determine whether he was competent to conduct his own defense (Pet. App. 9a-10a). In the court's view, the question of competency should not be considered separately from the question whether the assertion of the right of self-representation was knowing and intelligent, since "[t]he only condition on [the right of self-representation] is that it be asserted by the accused with his 'eyes open'" (id. at 10a (emphasis in original), quoting Faretta v. California, 422 U.S. 806, 835 (1975)). The court further explained that it was not called upon here to decide a "hard case" involving a marginally competent defendant desiring to proceed pro se, because petitioner has a high school education, is literate and fully fluent in English, and has no apparent physical or psychological disability, and that "[n]one of his many attorneys ever suggested that he was, in any sense, incompetent" (ibid.).

Finally, petitioner contended that the district court committed plain error in not declaring a mistrial sua sponte because, petitioner asserted, it became apparent that he was not receiving a fair trial because he was representing himself. The court rejected this argument, relying upon this Court's statement

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3/ The model inquiry is set forth in the appendix to the court's opinion (Pet. App. 12a-14a).

in Faretta that "'whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel"'" (Pet. App. 11a, quoting 422 U.S. at 834 n.46).

b. In a concurring opinion, Judge Engel concluded, based on "a careful review of the record, that this was a case in which [petitioner] sought not the protection of the constitutional guarantees to the right to counsel and to the right to represent one's self, but instead to manipulate a system designed for his own protection in order to gain advantage from a totally unwarranted and unjust abuse of it" (Pet. App. 15a). Judge Engel therefore expressed the view that petitioner had not "in any way, constitutional or otherwise, been dealt with unfairly" (ibid.). However, he endorsed the majority's invocation of its supervisory power to assure in future cases that there will be a full record pertaining to the waiver issue (id. at 15a-16a).

ARGUMENT

Petitioner renews his claim that the district court violated his right to counsel in granting his request to represent himself. In particular, petitioner contends that the court failed adequately to inquire into whether he knowingly and intelligently waived his right to counsel. The court of appeals correctly rejected this contention, and its decision presents no issue warranting review by this Court.

1. In Faretta, the Court stated that "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835, quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942). The Court went on to find that this standard was satisfied in that

case, because "Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel" (422 U.S. at 835); because "[t]he record affirmatively show[ed] that Faretta was literate, competent and understanding, and that he was voluntarily exercising his informed free will" (ibid.); and because "[t]he trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure" (id. at 835-836).

Each of the factors upon which the Court relied in Faretta in concluding that Faretta was sufficiently aware of the dangers and disadvantages of self-representation is also present here. Before permitting petitioner to represent himself, the district court explicitly informed him that he had a right to be represented by retained counsel or, if he was indigent, by appointed counsel (Pet. App. 20a-21a). Nevertheless, petitioner unequivocally expressed his desire to represent himself (id. at 3a-4a). The district court also made clear that petitioner would be required to follow applicable procedures, and indeed to consult with advisory counsel before raising any issues, and the court thereafter repeatedly indicated to petitioner that he was making a mistake by continuing to proceed on his own (id. at 4a). The court of appeals also specifically found that petitioner was literate and competent (id. at 10a) and that he had "elected to defend himself at trial with his 'eyes open'" (id. at 8a).

It also is significant that petitioner had extensive assistance of counsel before he elected to proceed pro se. He had retained a number of attorneys to assist him, both in connection with the instant charges and on other matters, and he was represented by appointed counsel at the time he elected to represent himself. That attorney informed the court that he had discussed the self-representation issue with petitioner. This

also is not a case in which the defendant's election to proceed pro se left him totally without the assistance of counsel. Consistent with the desire of petitioner and the attorney, the court provided for counsel to continue in the case on a stand-by or advisory basis. Pet. 2a-3a, 20a-22a. Furthermore, the court of appeals found it "clear that [petitioner] was not a stranger to the courts * * * and [that] he was not faced with a situation of enduring representation by counsel he considered ineffective or being forced to proceed immediately as his own," as was true in many of the cases petitioner cited (Pet. App. 8a). Nor was petitioner's decision to represent himself in any sense rash: he had expressed a desire to do so two months earlier, during the August 26, 1985 hearing (id. at 3a), and counsel's statements to the court at the October 23 hearing revealed that petitioner had given the matter considerable thought (id. at 20a).

On this record, the courts below reasonably concluded that petitioner "understood the dangers and disadvantages of self-representation at the time he made his choice" (id. at 8a). Given that understanding and the numerous objective indicia to support it, Faretta did not mandate that the district court nevertheless go through the ritual of a full-blown colloquy on the wisdom of self-representation. 4/

4/ Petitioner's reliance (Pet. 7, 10, 18) on Von Moltke v. Gillies, 332 U.S. 708 (1948), is misplaced. The issue in that case was not whether the petitioner had been adequately warned of the dangers of self-representation; Von Moltke was not a self-representation case. Rather, the issue in Von Moltke was whether the defendant had validly waived his right to counsel and pleaded guilty in reliance upon the erroneous advice of a government agent. Petitioner's reliance (Pet. 12-13) on Justice Marshall's dissent from the denial of certiorari in Raulerson v. Wainwright, 469 U.S. 966 (1984), is also misplaced. Although Justice Marshall discussed the language in Faretta stating that the defendant should be made aware of the dangers and disadvantages of self-representation, the central thesis of the dissent was that the petitioner had been improperly denied his right of self-representation and that "the precautions necessary to protect the right of counsel * * * not be permitted to eviscerate the right of self-representation" (id. at 969).

2. The decisions of other courts of appeals likewise do not support the conclusion that petitioner's Sixth Amendment right to the assistance of counsel was violated. To be sure, several courts of appeals have expressed a preference for, or even mandated, some degree of inquiry on the record, whereby the judge informs the defendant of the risks of self-representation. See e.g., United States v. Hafen, 726 F.2d 21, 25-26 (1st Cir.), cert. denied, 466 U.S. 962 (1984); United States v. Edwards, 716 F.2d 822, 824 (11th Cir. 1983); United States v. Bailey, 675 F.2d 1292, 1297-1302 (D.C. Cir.), cert. denied, 459 U.S. 853 (1982); United States v. Welty, 674 F.2d 185, 192 (3d Cir. 1982); United States v. Kimmel, 672 F.2d 720, 721-722 (9th Cir. 1982); United States v. Trapnell, 638 F.2d 1016, 1029 (7th Cir. 1980); United States v. Tompkins, 623 F.2d 824, 828 (2d Cir. 1980). In fact, in this case, the Sixth Circuit, in the exercise of its supervisory powers, adopted such a requirement to govern future instances of self-representation in the district courts in that Circuit. See Pet. App. 8a-9a. But the other courts of appeals have not required automatic reversal merely because of the failure to conduct such a full-blown hearing; rather, like the Sixth Circuit in this case, they have examined the record, including such inquiry as the district court did make, to determine whether the defendant made an effective waiver of his right to the assistance of counsel. 5/

5/ The Third Circuit has twice reversed a conviction because the district court did not conduct a formal inquiry. However, the circumstances of those cases were quite unlike this case. In United States v. Welty, supra, the defendant was apparently driven to proceed pro se because he was dissatisfied with his assigned counsel and because the district court had denied his motion for substitute counsel (674 F.2d at 189-193), and the court of appeals was particularly disturbed that the trial judge did not ask Welty's court-appointed attorney to serve as "standby counsel" and to help Welty if needed (id. at 193 n. 9). Here, by contrast, petitioner expressed no dissatisfaction with counsel and the district court provided appointed counsel to serve as standby counsel throughout the trial. In Plankhy v. Cuyler, 701 F.2d 728, 730-731 (3d Cir. 1983), the court reversed primarily because the trial judge did not inform Plankhy of his right to have counsel appointed, noting that Plankhy might have availed (Continued)

Here, the court of appeals concluded that the district court's failure to conduct an extensive hearing or specifically to discuss the disadvantages of self-representation did not require reversal because the record showed that petitioner understood the risks of self-representation (id. at 8a). Neither the court's examination of the record to determine if petitioner was denied his Sixth Amendment right to counsel, nor its determination that he was not, conflicts with any decision of another court of appeals. Review of that fact-bound decision therefore is not warranted. 6/

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himself of appointed counsel instead of representing himself. Id. at 731-732. Here, petitioner was represented by appointed counsel at the time he decided to proceed on his own, and the district court informed petitioner of his right to appointed counsel if he was indigent (Pet. App. 20a-21a).

Likewise, none of the state decisions cited by petitioner holds that the failure to conduct a full-blown hearing requires reversal in every case. As the court stated in one of those decisions, "where no colloquy exists on the record, this court will look to any evidence on the record that shows defendant's actual awareness of the risks of self-representation." City of Bellevue, v. Acrey, 691 P.2d 957, 962 (Wash. 1984).

6/ In his statement of the "Questions Presented For Review" (see Pet. i), petitioner identifies two additional issues: whether the district court should have inquired into his competence to represent himself and whether it should have declared a mistrial sua sponte when it became apparent that he could not represent himself effectively. However, in the argument section of the petition, petitioner mentions those issues only in passing. See Pet. 11. Suffice it to say that the court of appeals correctly concluded that "no degree of legal knowledge is required to knowingly and intelligently demand the right to represent oneself in a criminal proceeding," and that there is no suggestion in this record that petitioner was in any sense incompetent (Pet. App. 10a). As for petitioner's claim that the district court should have declared a mistrial because petitioner did not do an effective job of representing himself, that argument is precluded by Faretta's pronouncement that a defendant who chooses to represent himself may not assert that he received ineffective representation. See 422 U.S. at 834 n.6

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1987